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In the Supreme Court

OF THE

United States

OCTOBER TERM 1970

No. 612

WILLIAM R. SCAGGS, *Petitioner*

vs.

LIEUTENANT GENERAL STANLEY LARSEN, Commanding General, Sixth United States Army; and STANLEY RESOR, Secretary of the Army, *Respondents*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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WILLIAM R. SCAGGS,
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LIEUTENANT GENERAL STANLEY LARSEN, Commanding General, Sixth United States Army; and STANLEY RESOR, Secretary of the Army,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

The petitioner, William R. Scaggs, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 7, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A (hereinafter App. A) herein. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 7, 1970, affirming the denial of the Order to Show Cause hearing and the denial of the Writ of Habeas Corpus by the United States District Court for the Northern District of California rendered on July 24, 1969. An order extending time to file Petition for Writ of Certiorari was granted by Justice Douglas on June 24, 1970, extending the time for filing to and including September 4, 1970. This Petition for Writ of Certiorari was filed before September 4, 1970. This Court's jurisdiction is invoked pursuant to 28 USC § 1254(1).

QUESTIONS PRESENTED

(1) Whether it is a violation of the Due Process Clause of the Fifth Amendment for Petitioner, a member of the Army Ready Reserves, to be declared "delinquent" and subjected to eighteen (18) months of active duty by direction of the President, pursuant to 10 USC § 673a, without being afforded a hearing to contest his delinquent status.

(2) Whether retroactive application of 10 USC § 673a to petitioner was a violation of the Due Process Clause of the Fifth Amendment because it violated petitioner's enlistment contract and because it unnecessarily infringed on his personal freedom.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fifth Amendment, due process clause:

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

10 USC § 270 [as amended Pub. L. 87-378, § 2, Oct. 4, 1961, 75 Stat. 807; Pub. L. 88-110, § 4, Sept. 3, 1963, 77 Stat. 136; Pub. L. 90-168, § 2(10), Dec. 1, 1967, 81 Stat. 523]:

> (b) . . . A member of the Ready Reserve covered by this section who fails in any year to satisfactorily perform the training duty prescribed in subsection (a), as determined by the Secretary concerned under regulations to be prescribed by the Secretary of Defense, may be ordered without his consent to perform additional active duty for training for not more than 45 days. If the failure occurs during the last year of his required membership in the Ready Reserve, his membership is extended until he performs that additional active duty for training, but not for more than six months . . .

10 USC § 673a [added Pub. L. 90-40, § 6(1), June 30, 1967, 81 Stat. 105]:

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;

(2) has not fulfilled his statutory reserve obligation; and

(3) has not served on active duty for a total of 24 months.

(b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period . . .

50 USCA § 456(c)(2)D:

Notwithstanding any other provision of this Act, the President, under such rules and regulations as he may prescribe, may provide that any person enlisted or appointed after October 4, 1961, in the Ready Reserve of any reserve component of the Armed Forces (other than under section 511(b) of Title 10), the Army National Guard, or the Air National Guard, prior to attaining the age of twenty-six years, or any person enlisted or appointed in the Army National Guard or the Air National Guard or enlisted in the Ready Reserve of any reserve component prior to attaining the age of eighteen years and six months and deferred under the prior provisions of this paragraph as amended by the Act of October 4,

1961, Public Law 87-378 (75 Stat. 807); or under section 262 of the Armed Forces Reserve Act of 1952, as amended [former section 1013 of Title 50], who fails to serve satisfactorily during his obligated period of service as a member of such Ready Reserve or National Guard or the Ready Reserve of another reserve component or the National Guard of which he becomes a member, may be selected for training and service and inducted into the armed force of which such reserve component is a part, prior to the selection and induction of other persons liable therefor.

32 CFR 1631.8 [E.O. 10659, 21 F.R. 1103, Feb. 17, 1956, as amended by E.O. 11188, 29 F.R. 15563, Nov. 20, 1964, E.O. 11360, 32 F.R. 9794, July 4, 1967].

(a) Notwithstanding any other provision of the regulations in this chapter, any registrant enlisted or appointed after October 4, 1961, in the Ready Reserve of any reserve component of the Armed Forces (other than under section 511(b) of title 10, United States Code), the Army National Guard, or the Air National Guard, prior to attaining the age of 26 years, or any registrant enlisted or appointed in the Army National Guard or the Air National Guard prior to attaining the age of 18 years and 6 months and prior to September 3, 1963, and deferred under the provisions of section 6 (c)(2)(A) of the Universal Military Training and Service Act, as amended, which were in effect prior to September 3, 1963, or any registrant enlisted in the Ready Reserve of any reserve component of the Armed Forces prior to attaining the age of 18 years and 6 months and prior to August 4, 1963, and deferred under section 262 of the Armed

Forces Reserve Act of 1952, as amended, who fails to serve satisfactorily during his obligated period of service as a member of such Ready Reserve or National Guard or the Ready Reserve of another reserve component or the National Guard of which he becomes a member as certified by the respective armed force, shall be ordered to report for induction by the local board regardless of the class in which he is classified and without changing his classification . . .

Para. 20, AR 135-91 (11 June 1968)

20. Appeals. a. General. An individual who has been denied a requested discharge or delay in order to active duty may appeal such denial . . .

STATEMENT OF THE CASE

Petitioner William R. Scaggs was, when his Petition for Habeas Corpus was filed in the United States District Court, a private not on active duty in the Ready Reserve of the United States Army. He was attached to the Sixth Army, located in the Presidio of San Francisco.

Scaggs enlisted in the Army Reserve on September 30, 1963. By the terms of his enlistment contract he was required to serve satisfactorily in the Reserves and for failure to do so he was subject to a penalty assignment to active duty for training for 45 days pursuant to 10 USC § 270. Scaggs' enlistment contract was to have expired on September 30, 1969.

Subsequently, in 1967, the 90th Congress enacted Public Law 90-40, codified in 10 USC § 673a. It pro-

vided that the President may order to active duty any member of the Ready Reserve or an Armed Force who was not participating satisfactorily in a unit of the Ready Reserve, or who has not served his statutory reserve obligation and has not served on active duty for a total of 24 months.

Scaggs served for three (3) months of his active duty for training, which was the period required of him by applicable statutes and regulations at the time of his enlistment. Thereafter, because of his occupation, Scaggs was assigned to various control groups, under applicable Army Reserve regulations. Until April 11, 1969, petitioner's military record was without a blemish, and he had satisfied all of the applicable regulations and requirements with respect to his reserve obligation. He was at all times, of course, subject to a call to active duty in event of war.

In January of 1969 he was ordered to join a unit. He was given until April 11, 1969 within which to become a member of a unit in San Francisco. Petitioner sought diligently to find a unit which would accept him in the San Francisco area. He was rejected by a number of such units on the ground that his military obligation would terminate and his enlistment would end on September 29, 1969 and it was not desired to admit a new member for such a short period of service remaining.

On or about April 11, when he had been unable to enter a unit, he consulted the reserve personnel office at the Presidio and acquainted that office with his plight. He was told that the matter would be resolved

and was given a later date to report to the office. On that date he reported to the office at the Presidio but was told that he would not be accepted into a unit.

On June 10, 1969, petitioner was ordered to report on July 28, 1969 to the Army at Fort Ord, California, for a period of active duty extending over eighteen (18) months and twenty-four (24) days pursuant to 10 USC § 673a.

Before receiving said order, petitioner did not receive notice that he had in fact been declared "delinquent" as of April 11, 1970, or that there were any avenues of appeal open to him. He was thereby ordered to report for eighteen (18) months of active duty without any opportunity to be heard to contest his "delinquent" status.[1]

Petitioner thereupon filed a petition for Habeas Corpus in the United States District Court. The Court declined to issue an Order to Show Cause or grant any relief whatsoever. On August 5, 1969, Mr. Justice Douglas granted a Motion for Stay. The stay of the active duty order is in effect pending final action by this Court.

On appeal to the Court of Appeals for the Ninth Circuit, petitioner there urged that it was a fundamental denial of due process to declare petitioner "delinquent" and order him into active duty without

[1]Since Seaggs initiated his suit in the United States District Court, the Army Reserve has changed its policies and procedures governing satisfactory participation. The Army Reserve now formally notifies men of their "delinquent" status, and new appeal procedures for contesting the "delinquent" status are in effect. See App. B.

affording him a hearing, and that retroactive application of 16 USC § 673a to petitioner's enlistment contract was a denial of due process.

The Court below affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

A. DENIAL OF A HEARING

1. The decision below is in direct conflict with the spirit of recent decisions of this Court which expressly rejected the "delinquency" procedures used by the Selective Service System in penalizing registrants by accelerating induction without the benefit of a hearing.

The Court below rejected the issue of a denial of a hearing as none of the cases cited in its decision dealt with the problem. This is especially distressing as the decision was rendered after the teachings of *Oestreich v. Selective Service System*, 393 U.S. 233 (1968), *Breen v. Selective Service System*, 396 U.S. 460 (1970), and *Gutknecht v. United States*, 396 U.S. 295 (1970).

This Court has consistently held that when decisions are rendered through administrative channels which create substantial infringements upon life and liberty, due process requires a hearing, whether formal or informal. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). *Oestreich, supra, Breen, supra, Gutknecht, supra.*

Most recently this Court has expressed its great concern over the deficiencies of the Selective Service System where petitioner's contemporaries have been

declared "delinquent" and ordered to report for induction without being afforded a hearing to contest their newly acquired status. In *Oestreich, supra*, Mr. Justice Harlan, in a separate concurring opinion, stated:

> "To withhold pre-induction review in this case would thus deprive petitioner of his liberty without the prior opportunity to present to *any* competent form—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure. Such an interpretation of Section 10 (b)(3) would raise serious constitutional problems, and is not indicated by the statute's history, language or purpose . . ." Id., at 243-244.

In footnote 6 appended to that statement, Mr. Justice Harlan says:

> "It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims. [Citing cases]. The validity of summary administrative deprivation of liberty without a full hearing may turn on the availability of a prompt subsequent hearing, cf. United States Constitution, Amendment VI; [citing cases]—something not made meaningfully available to petitioner here, either by the option of defending a criminal prosecution for refusing to report for induction, [citing cases], or by filing a petition for a Writ of Habeas Corpus after induction. [citing cases].
>
> "The problem is exacerbated by petitioner's non-frivolous argument that induction pursuant to the delinquency reclassification procedure consti-

> futes 'punishment' for violation of collateral regulations, without jury trial, right to counsel, and other constitutional requisites [citing cases]. It is not necessary to decide this issue. If petitioner's claim is valid, however, then postponement of a hearing until after induction is tantamount to permitting the imposition of summary punishment, followed by loss of liberty, without possibility of bail, until such time as the petitioner is able to secure his release by Writ of Habeas Corpus. This would, at the very least, cut against the grain of much that is fundamental in our constitutional tradition. cf. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts, 66 Harv. L. Rev. 1362; 1380-1383 (1953)."

Later, Mr. Justice Douglas, writing for the Court in *Gutknecht, supra,* declared:

> "The power under the regulations to declare a registrant 'delinquent' has no statutory standard or even guidelines. The power is exercised entirely at the discretion of the local board. It is a broad, roving authority, a type of administrative absolutism not congenial to our lawmaking traditions. In *Kent v. Douglas*, 357 U.S. 116, 128-129, we refused to impute to Congress the grant of 'unbridled discretion' to the Secretary of State to issue or withhold a passport from a citizen 'for any substantial reason he may choose.'" Id., at 128. Where the liberties of the citizen are involved, we said that 'we will construe narrowly all delegated powers that curtail or dilute them.' Id., at 129." Id. at 306-307.

Mr. Justice Stewart, concurring in *Gutknecht, supra,* interpreted the applicable regulations as af-

fording "delinquent" registrants procedural rights to contest their status, thereby satisfying requirements of due process.

In giving the Army Reserve the authority to declare that a reservist is performing unsatisfactorily, Congress has intended as a "penalty" either priority induction via the Selective Service System or a direct order to report to active duty pursuant to 10 USC § 673a. *Schmitt v. United States*, 2 SSLR 3146 (CA 5, June 11, 1969).

The applicable Army Regulations in effect at the times complained of did not afford petitioner *any* review of the "decision" that on April 11, 1969 he was performing unsatisfactorily. Para. 20, AR 135-91, stated in relevant part that an appeal is only available to "An individual who has been denied a requested discharge or delay in order to active duty . . ."

Petitioner submits that the decision below is thus in direct conflict with all authority on the issue and repugnant to the fundamental concept expressed in *Kent v. Douglas, supra*, that "where liberties of the citizen are involved, we will construe narrowly all delegated powers that curtail or dilute them." Id., at 129.

2. The order to active duty pursuant to 10 USC § 673a was a denial of equal protection.

Prior to the enactment of 10 USC § 673a, a reservist who was performing unsatisfactorily would be "certified" to his local board, under the authority of 50 USC § 456(c)(2) D, for "priority induction" pursuant to

32 CFR § 1631.8 or ordered to report for 45 days active duty pursuant to 10 USC § 270.

The enactment of Public Law 90-40, codified in 10 USC § 673a, did not preempt that procedure, but, rather, gave the commanding officer discretion to seek either avenue to active duty for a period longer than 45 days upon a "finding" of unsatisfactory performance.

The Court below cited and relied on *Schwartz v. Franklin,* 412 F.2d 736 (1969), which, at page 738, incorrectly stated that "It is doubtful whether Schwartz's personal freedom has been adversely affected to a greater degree by his activation under 10 USC § 673a than by referral to the Selective Service System." For if the petitioner had been certified to his local board pursuant to 50 USC § 456 (c) (2) D for priority induction, he would have enjoyed procedural rights of hearings, appeal, and other remedies. In *Mader v. Clifford,* 1 SSLR 3185, (N.D. Calif., July 26, 1968), the District Court held that ". . . in the present case, assuming the Marine Corps had a choice to certify plaintiff to his draft board as an unsatisfactory participant, once it chose to certify him to the draft board as an unsatisfactory participant, it could not deny him the procedural rights of review and appeal of his 1-A classification . . ." Id., at 3185. See also *Quaid v. United States,* 386 F.2d 25 (10th Cir., 1967). *Olson v. United States,* 2 SSLR 3637, (9th Cir., Mar. 26, 1970).

Petitioner submits that the authority delegated to the Army Reserve to order Petitioner into active duty

by means which deny him any review, when there are avenues to the same end which grant procedural rights of review, creates a fundamental denial of equal protection in violation of the Fifth Amendment to the United States Constitution. This procedure is especially repugnant to the Fifth Amendment as there are no standards or guidelines which the Army Reserve may rely upon when exercising its discretion.

3. The Courts of Appeals are in conflict.

In affirming the decision of the District Court that petitioner was not even entitled to a hearing on the question of whether there was a "basis in fact" for the finding that petitioner was not performing satisfactorily, the decision of the Court below creates a conflict with the decisions of other circuits.

In *Schmitt v. United States, supra,* the Fifth Circuit adopted the holding in *United States ex rel. Goldstein v. MacNamara*, E.D. Pa. 1967, 270 F.Supp. 892, where the District Court specifically held that a hearing must be granted to determine the lawfulness of the reservist's certification to his local board for unsatisfactory performance. At page 13149, the Court in *Schmitt* stated:

> "The trial judge in the case at bar, perhaps also loathe to dispense with the customary safeguards which the law has designated for the protection of the accused, heard testimony on the certification issue in chambers, out of the presence of the jury. Adopting such a procedure, he appears to have followed the practice established in *Cox v. United States*, 1947, 332 U.S. 442, 68

S.Ct. 115, 92 L.Ed 59, for the determination of the lawfulness of the registrant's classification, and also adopted in the *United States ex rel. Goldstein v. MacNamara*, Ed. Pa 1967, 270 F. Supp. 892, for the determination of the lawfulness of a reservist's certification. We commend the trial judge's adoption of such a procedure . . ." See also *Estep v. United States*, 1946, 327 U.S. 114, *Eagles v. U.S. ex rel. Samuels*, 329 U.S. 304 (1946), *Powers v. Powers*, 400 F.2d 438 [5th Cir. 1968].

B. RETROACTIVE APPLICATION OF 10 USC § 673a TO PETITIONER'S ENLISTMENT CONTRACT

1. The question presented is one of first impression and has broad importance.

The present situation is one without precedent that counsel has been able to find. The existence side by side of two statutes governing the same subject, imposing different sanctions for the same conduct, without any indication by the Congress of the criteria by which to determine when one statute applies rather than the other, calls for statutory interpretation by this Court to illuminate the situation and avoid the unconstitutionality that may result from the present situation.

In 10 USC § 270 it is provided that for failure to participate satisfactorily in a reserve unit, a member of the Ready Reserve may be required to serve not more than 45 days of involuntary active duty. In 10 USC § 673a for the same conduct the penalty is 24 months of active duty. 10 USC § 673a provides that

this shall be the penalty "notwithstanding any other provisions of law" and the court below accepted that exculpatory language by relying on *Schwartz v. Franklin, supra.* In the absence of a Congressional expression on the question when one statute applies rather than the other, the court must look to other aids of interpretation which will remove the uncertainty and capricious aspect of the present arrangement.

The practice of the Army Reserve before the passage of Public Law 89-687, later reenacted with slight changes as Public Law 90-40, now codified as 10 USC § 673a, was to accept enlistments with a provision in the enlistment contract that in the event of unsatisfactory service the enlistee would be subjected to not more than 45 days of involuntary service, and his enlistment could be extended not more than 6 months in order to serve that period of active duty. Since the passage of Public Law 90-40, presumably the enlistment contracts have not contained the language that was in use prior to the passage of that act.

In the case at bar petitioner's agreement contained the language about 45 days. In order to avoid the possibly fatal constitutional problems involved in uncertainty in statutes which impose punishment, it appears reasonable to hold that Congress intended the provisions of Section 270 to apply to those who enlisted when that statute governed their liability for failure to participate satisfactorily in a reserve unit, and intended Public Law 90-40, 10 USC § 673a, to apply to those whose contracts were executed after the effective date of the second statute.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, San Francisco, California,
August 19, 1970.

Respectfully submitted,
R. JAY ENGEL,
ROBERT MICHAEL ZWEIG,
Attorneys for Petitioner.

(Appendice Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

William R. Seaggs, Plaintiff-Appellant, vs. Lieutenant General Stanley Larsen, etc., Defendant-Appellee.	No. 24,609

[April 7, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: HAMLEY, DUNIWAY and TRASK,
Circuit Judges

Per Curiam:

The order appealed from is affirmed. *Schwartz v. Franklin*, 9 Cir., 1969, 412 F.2d 736; *Winters v. United States*, 9 Cir., 1969, 412 F.2d 140; *Raderman v. Kaine*, 2 Cir., 1969, 411 F.2d 1102.

Appendix B

(Seal)

Department of the Army
Headquarters Sixth United States Army
Presidio of San Francisco, California 94129

In Reply Refer To

AMAGR-2
SSAN

Subject: Appeal of Involuntary Order to Active Duty

1. A recommendation has been submitted by your Reserve unit commander that you be involuntarily ordered to active duty because of your unsatisfactory participation with your Reserve unit of assignment.

2. The documents submitted by your Commanding Officer have been reviewed and this headquarters has determined that all procedural and regulatory requirements were met leading to your classification as an unsatisfactory participant.

3. You are advised that you have the right to appeal your involuntary order to active duty. Your appeal, if initiated, must be submitted not later than 15 days from the date of receipt of this letter and must be submitted to the Commanding Officer,..... within the 15 day period.

4. Your appeal, if submitted, must explain any facts pertinent to your case which you feel were not fully

considered and you may include any additional appropriate documents that you wish to present.

For The Commander:

Copy Furn:
GOCOM Commander
Unit Commander

SAH FL 910
18 MAR 70